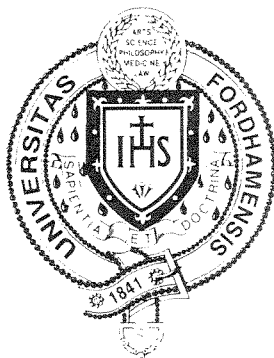


# The Ethical Foundations of American Judicial Independence

Vincent R. Johnson

Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 Fordham Urb. L. J. 1007 (2002).

# FORDHAM URBAN LAW JOURNAL



## THE ETHICAL FOUNDATIONS OF AMERICAN JUDICIAL INDEPENDENCE

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FORDHAM URBAN LAW JOURNAL  
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# THE ETHICAL FOUNDATIONS OF AMERICAN JUDICIAL INDEPENDENCE

Vincent R. Johnson\*

*Our Constitution . . . [and] Bill of Rights . . . [contain] protections of individual rights . . . [I]mportant as these guarantees are, by themselves they were not a uniquely American contribution to the art of government. Long before them England had produced the Magna Carta, the Petition of Right, and the Declaration of Rights. Simultaneously with them in France there was the Declaration of the Rights of Man.*

*The uniquely American contribution consisted of the idea of placing these guarantees in a written constitution which would be enforceable by an independent judiciary. This idea that the rights guaranteed by the Constitution would be enforced by judges who were independent of the executive was something found in no other system of government at that time. It was a unique American contribution to the theory and practice of government.*

—Chief Justice William H. Rehnquist<sup>1</sup>

## I. STRUCTURAL FOUNDATIONS OF JUDICIAL INDEPENDENCE

When one thinks of the independence<sup>2</sup> of the American judiciary, the mind focuses first on federal courts. There have been many pivotal cases in which independent judges stood against the tides of public opinion or the power of the legislative and executive

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1. Chief Justice William H. Rehnquist, Address at Northern Illinois School of Law (Oct. 20, 1988).

2. There is a question as to how "judicial independence" should be defined. A useful working definition was offered by Jean Reed Haynes, president of the American Judicature Society:

When AJS talks about independent judges or the concept of judicial independence we mean that judges should be free from undue and inappropriate pressures that detract from their ability to interpret laws and apply them to the specific facts of the case.

*An Interview with Jean Reed Haynes, President, American Judicature Society, THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS (Administrative Office of the U.S. Courts, Washington, D.C.), Jun. 2001, at 10 (discussing the mission of the Center for Judicial Independence).*

branches. The role of the federal courts in ending segregation,<sup>3</sup> holding presidents accountable,<sup>4</sup> according women equal treatment,<sup>5</sup> and protecting the rights of the accused<sup>6</sup> come to mind.

Most lawyers and many citizens could recall the federal constitutional bases for judicial independence. Article III mandates that positions be filled through appointment by the President and confirmation by the Senate.<sup>7</sup> That formidable selection process almost invariably ensures that federal judges are intelligent, well educated, and professionally experienced. Those qualities are conducive to judicial independence. In addition, federal judges enjoy the following constitutional guarantees: life tenure during good behavior,<sup>8</sup> non-reducible compensation,<sup>9</sup> and removal only through impeachment.<sup>10</sup> These protections free federal judges from the need to behave in politically advantageous ways in order to keep their positions.<sup>11</sup> They also insulate judges from retribution when they make unpopular decisions.<sup>12</sup>

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3. *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (rejecting the doctrine of "separate but equal" in the public elementary school context).

4. *E.g.*, *Clinton v. Jones*, 520 U.S. 681 (1997) (holding that the Constitution does not afford the president temporary immunity from civil damages litigation arising out of events that occurred before he took office); *United States v. Nixon*, 418 U.S. 683 (1974) (holding that the president's interest in confidentiality did not outweigh the Watergate special prosecutor's need for tape recordings and documents); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (seizure of steel mills was not within the constitutional power of the president).

5. *E.g.*, *United States v. Virginia*, 518 U.S. 515 (1996) (holding that Virginia violated the equal protection clause by excluding women from a citizen-soldier program offered at a military college).

6. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that police must inform suspects of their rights before questioning them during custodial interrogation).

7. U.S. CONST. art. II, § 2.

8. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.")

9. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.")

10. U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.")

11. Troy A. Eid, *Judicial Independence and Accountability: The Case Against Electing Judges*, COLO. LAW., July 2000, at 71.

At the founding of our country, Alexander Hamilton argued in *Federalist* No. 78 that judicial independence was so important that federal judges must be appointed for life. "Nothing will contribute so much . . . to the independent spirit in the judges," Hamilton argued, "as the permanent tenure of judicial offices."

*Id.*

12. While judges must be accountable through appellate review for their decisions, they need to be protected from unfair ad hominem attacks. *Cf.* Hon. Susan Weber

State judges may be less independent than their federal counterparts. Indeed, it has been remarked that "The state court house is, if anything, too close to the state legislative house. . . ."<sup>13</sup> In many states, particularly those where judges are elected at some or all levels,<sup>14</sup> the screening process can be considerably less rigorous than in the federal courts.<sup>15</sup> Elections are frequently decided not by qualifications (about which the voting public often knows little) but by advertising. Campaign contributions that buy advertising undermine judicial independence<sup>16</sup> by clouding the exercise of judicial judgment with considerations related to financial obligation.<sup>17</sup> Also, state judges typically must win re-appointment or re-election on a relatively frequent basis,<sup>18</sup> sometimes every four or

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Wright, *In Defense of Judicial Independence*, 25 OKLA. CITY U. L. REV. 633, 635 (2000) ("A judge who is concerned that his or her rulings might affect his or her career is a judge who might lose focus on the most important of judicial duties: to maintain the rule of law.")

13. Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 1007 (1982).

14. Sources differ as to the number of states that elect judges, although the number is considerable. Compare Eid, *supra* note 11, at 72 ("[T]wenty-one states elect appellate judges, trial judges, or both, either through partisan or non-partisan elections. The remaining states use some form of appointment process, and most of those have a merit plan component."), with William V. Dorsaneo, *Opening Comment to the March 1999 Roy R. Ray Lecture "Judicial Independence and Democratic Accountability in the Highest State Courts,"* 53 SMU L. REV. 255, 257 (2000) ("Although forty states elect or re-elect some of their judges, only nine states, including Texas, do so with regard to higher State Court judges through partisan judicial elections").

15. See generally Kathy Walt, *Interest Continues to Grow in Appeals Court Races*, HOUSTON CHRON., Feb. 20, 2000 at 1 (describing a judge elected to the Texas Court of Criminal Appeals in 1996 despite "campaign trail confessions that he had, indeed, lied about his background and the extent of his legal experience").

16. Eid, *supra* note 11, at 72 ("The increasingly high cost of judicial campaigns is well documented. In 1986, the two candidates for chief justice of the Ohio Supreme Court spent more than \$3 million. Two years later, candidates for the six open seats on the Texas Supreme Court raised more than \$10 million.")

17. Cf. Jerome J. Shestack, *President's Message: The Risks to Judicial Independence*, A.B.A. J., June 1998, at 8 ("[A] judge who owes a seat to contributions from politicians, labor leaders, corporate executives or lawyers suffers from a tarnished independence.")

18. See AM. BAR ASS'N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997), <http://www.abanet.org/govaffairs/judiciary/r5.html>.

Unlike federal judges, the vast majority of state systems provide for the selection or retention of judges through some form of popular election. Eight states select judges through partisan elections. Thirteen do so through non-partisan elections. Of the remaining twenty-nine states, initial appointments are made by the governor or legislature in six states, and by some form of merit selection commission in twenty-three states, but in seventeen of those twenty-nine, the judges stand for reelection or retention election. In total,

six years.<sup>19</sup> With the shadow of the next campaign looming, it can be hard to focus on doing what is right under the law and the facts, rather than doing what is popular.

There are other obstacles to state judicial independence. The financial provisions for state judicial service and retirement are sometimes inadequate to attract or retain well qualified judges.<sup>20</sup> Controversial rulings may result in legislatures withholding salary increases or reducing appropriations for the judicial system as a whole.<sup>21</sup> And criticism fueled by single-issue politics may cause good judges to be swept from office by elective or appointive authorities, or to voluntarily resign.<sup>22</sup> Indeed, in some recent instances, judges have even been threatened with physical violence because of their decisions.<sup>23</sup> It has also been argued that state sys-

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then, state judges are subject to election, reelection or retention election in thirty-eight states.

*Id.*

19. For example, in Texas, state district judges are elected every four years, *see* TEX. CONST. art. V, § 7, and state court of appeals justices are elected every six years, *see* TEX. CONST. art. V, § 4.

20. *See generally* BERNARD S. MEYER, JUDICIAL RETIREMENT LAWS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA 15-16, 24-26, 36-41 (1999) (discussing wide variations in retirement benefits and compensation for judicial services rendered by retired judges).

21. AM. BAR ASS'N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997), <http://www.abanet.org/govaffairs/judiciary/r5.html> (reporting that "a representative of the Conference of Chief Justices characterized 'the ability of legislatures to . . . determine our budgets' as 'one of the greatest threats to judicial independence . . . at the state level'").

22. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev. 315, 316 (1999) ("Today judges in some states are losing their offices because decisions with which they are associated have become lightning rods for the purveyors of single-issue politics.")

23. *See* Jerome J. Shestack, *President's Message: The Risks to Judicial Independence*, 84 A.B.A. J. 8 (1998).

Threats of physical violence against judges are on the rise. An example is the menacing messages to the chief justice of Oklahoma by organized militia groups angered by the court's decisions limiting the ability of such groups to act illegally. Obviously, this has a chilling effect on the court.

*Id.*

tems imposing mandatory retirement based on age<sup>24</sup> threaten judicial independence.<sup>25</sup>

Despite these threats, one could make a strong case that state judges often exercise a high degree of judicial independence. An excellent example is the transformation of American tort law during the twentieth century. During the 1900s, state judges led the fight to make the rules governing accident compensation more responsive to the needs of injured persons and the public interest in deterring accidents.<sup>26</sup> State judiciaries have also sometimes surpassed the federal courts in protecting individual rights.<sup>27</sup> Thus, it

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24. See ABA, STANDARDS FOR STATE JUDICIAL RETIREMENT STANDARD 5 CMT. c (2000).

The provisions of jurisdictions that mandate retirement for age are far from consistent. Twenty-four states require retirement on attaining 70, or at the end of the year in which age 70 is attained. However, a number of those provisions are not absolute: sixteen of the states make exceptions to the stated requirement. In addition, four states set the age for mandatory retirement at 72, one at 73, the District of Columbia at 74, and eight states at 75. In these jurisdictions, too, there are a number of exceptions.

*Id.*

25. Christopher R. McFadden, *Judicial Independence, Age-Based BFOOS, and the Perils of Mandatory Retirement Policies for Appointed State Judges*, 52 S.C. L. REV. 81, 134 (2000) (stating that mandatory retirement policies threaten judicial independence).

26. Cf. PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 5-7 (1988) (criticizing the reformulation of American tort law which began at mid-century with the efforts of academics and judges and ultimately "changed the common law as profoundly as it had ever been changed before"), reviewed by Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026, 1045 (1989).

27. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Commenting on the Brennan article, an author who recently served as chief justice of the Connecticut Supreme Court wrote:

[Justice Brennan's] famous 1977 article, "State Constitutions and the Protections of Individual Rights," was an eloquent and cogent reminder that because of dual sovereignty, state law and state courts could play an important role as guarantors of civil and political rights. His article was a clarion call to lawyers and judges not to overlook the capacity of state law, especially state constitutional law, to assist in the pursuit of justice for all . . . .

Twenty years later, the judges and justices of the state courts have taken Justice Brennan's message to heart by undertaking innovative measures to protect individual rights through state constitutions and through independent interpretations of the Federal Constitution . . . .

Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1066-67 (1998); see also Judith S. Kaye, *State Courts at The Dawn of a New Century: Common Law Courts Reading Statutes And Constitutions*, 70 N.Y.U. L. REV. 1, 13 (1995) (discussing cases in which state courts have concluded that their own constitutions afford greater protection than the minimum floor provided by the federal Constitution).

would be inaccurate and unfair to suggest that state courts are subservient to the other state government branches or the whims of public opinion.

If both the federal and state judiciaries exhibit judicial independence, then judicial independence is not simply a function of provisions governing judicial selection, compensation, and retention of office, which differ greatly among the federal and state governments. There must be other factors that have allowed judicial independence to flourish in America in a way that has often not been the case in other countries.<sup>28</sup>

One factor easily overlooked, but quite significant, is the judicial ethical norms that have developed in the United States. These norms shape the conduct of American judges on a daily basis and give concrete meaning to the idea that judges should be free from undue or inappropriate pressures when performing the duties of office.

In focusing primarily on these types of threats, this article is concerned mainly with threats to "decisional" judicial independence, rather than "institutional" independence.<sup>29</sup> However, to the extent

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28. See generally Johannes Cahn, *Judicial Independence: Controversies on the Constitutional Jurisdiction of the Court of Final Appeal of the Hong Kong Special Administrative Region*, 33 INT'L L.A. 1015 (1999) (discussing judicial independence issues arising under China's "one country, two systems" policy); Laifan Lin, *Judicial Independence in Japan: A Re-Investigation for China*, 13 COLUM. J. ASIAN L. 185 (1999) ("[I]n the history of Asian countries such as China and Japan, judicial power and administrative power have long been one integrated mass, and thus, it is difficult to establish an independent image of judicial power, which may be the situation in China today"); Myint Zan, *Judicial Independence in Burma: No March Backwards Towards the Past*, 1 ASIAN-PAC. L. & POL'Y J. 5, 1 (2001) (discussing how the military "eroded and extinguished the independence of the judiciary in Burma"); see also Vincent Robert Johnson, *The French Declaration of the Rights of Man and Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B.C. INT'L & COMP. L. REV. 1, 14-24 (1990) (discussing how the absence of an independent judiciary to protect individual rights contributed to abuses during the French revolution).

29. Shirley Abrahamson describes the difference between the two concepts as follows:

Scholars speak of two overlapping types of judicial independence: first, institutional judicial independence (sometimes referred to as branch independence), and second, individual judicial independence (sometimes referred to as decisional independence).

Institutional judicial independence, or branch independence, embodies the concept that the judiciary is a separate branch of government acting independently of the legislative and executive branches. Institutional judicial independence involves the relations between the branches of government and is closely related to the separation of power doctrine. Under our form of government, the judicial branch checks over-concentrations of power in the executive and legislative branches. Although an independent branch, the judiciary is dependent on the executive and legislative branches for funding.



that the relevant ethical norms have been codified in all states and are enforced by disciplinary tribunals, there is obviously an important institutional dimension to these norms. Without these enforceable norms,<sup>30</sup> the concept of American judicial independence, as manifested in the conduct of judges, would be uncertain, widely variable, and perhaps unrecognizable.

## II. RULES OF JUDICIAL ETHICS BEARING ON JUDICIAL INDEPENDENCE

The principal guide on issues involving the conduct of the judiciary is the ABA Model Code of Judicial Conduct (the Judicial Ethics Code).<sup>31</sup> The current code and its predecessor<sup>32</sup> have influenced the law throughout the country.<sup>33</sup> It must be empha-

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for establishing the court structure and jurisdiction of the courts, and often for selection of judges. Institutional judicial independence refers to independence of the judiciary as a body. Institutional judicial independence in turn serves individual judicial independence.

Individual judicial independence, or decisional independence, embodies the concept that individual judges decide cases fairly, impartially, and according to the facts and the law, not according to whim, prejudice, fear, or the dictates of the legislative or executive branches or the latest public opinion poll. Individual judicial independence is crucial to ensuring that each case is resolved according to the law. Individual judicial independence is thus a means to an end—the end being the resolution of disputes based on law.

Shirley S. Abrahamson, *Courtroom with a View: Building Judicial Independence with Public Participation*, 8 WILLAMETTE J. INT'L L. & DISP. RESOL. 13, 15-16 (2000); see also Thomas L. Cooper, *Attacks on Judicial Independence: The PBA Response*, 72 P.A. B. ASS'N Q. 60, 61 (2001).

There are two separate sides to the judicial independence coin. One side takes the form of "decisional" independence, or the right of each judge to decide a matter before him free of outside pressure or influence. The other side of the coin is "institutional" independence, or the right of the entire judicial system, as a separate branch of government, to be free from outside attack by individuals or by other branches of the government.

*Id.*

30. See generally Randy J. Holland & Cynthia Gray, *Judicial Discipline: Independence with Accountability*, 5 WIDENER L. SYMP. J. 117, 125-37 (2000) (discussing the state judicial conduct organizations and federal judicial councils that enforce judicial ethics rules).

31. MODEL CODE OF JUDICIAL CONDUCT (1990).

32. MODEL CODE OF JUDICIAL CONDUCT (1972).

33. A brief history of judicial ethics codes states:

In 1924, the ABA adopted the Canons of Judicial Ethics. During the 1960s, the federal Judicial Conference of the United States developed standards for federal judges. Soon after the ABA adopted the Model Code of Professional Responsibility [in 1969], the ABA appointed a commission to produce a revised code of conduct for judges. The resulting document . . . [was] the 1972 Code of Judicial Conduct. In 1990, the ABA replaced the 1972 Code

sized that state codes vary from the ABA model in numerous respects, so the code of the jurisdiction in question must be consulted in any given case. For example, since all judges are elected in Texas, the Texas canon on political activities by judges and judicial candidates is materially different from the parallel canon in the ABA code.<sup>34</sup>

It would be easy to read the entire Code of Judicial Conduct as an homage to the principle of judicial independence. Indeed, the first sentence of the preamble states: "Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us."<sup>35</sup> Canon 1 then proclaims the leitmotif that animates every section of the Code and many decisions interpreting its provisions: "A judge shall uphold the integrity and independence of the judiciary."<sup>36</sup> Further, aspirants for judicial office are admonished to "maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary."<sup>37</sup>

Still, it is more instructive to focus on substantive provisions in the judicial ethics code designed to minimize intrusions upon independent judicial decision making. There are at least four areas of concern directly bearing on judicial independence. These categories encompass the rules relating to (1) *ex parte* communications, (2) gifts, (3) political activities, and (4) certain problematic relationships. The standards governing each of these subjects define, in large measure, the ethical foundations of American judicial independence.

### A. *Ex Parte* Communications

It is axiomatic under the American system of justice that all sides to a dispute have a right to be heard. The rules<sup>38</sup> prohibiting sub-

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with a new Code of Judicial Conduct. By 1999, twenty state supreme courts had adopted new standards of judicial conduct based in whole or in part on the 1990 Model Code of Judicial Conduct.

PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 989 (John S. Dzienkowski ed., abridged ed. 2001).

34. Cf. TEX. CODE JUD. CONDUCT Canon 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 2000), *with* MODEL CODE OF JUDICIAL CONDUCT Canon 5 (1990).

35. MODEL CODE OF JUDICIAL CONDUCT 1 (1990).

36. *Id.* at Canon 1.

37. *Id.* at Canon 5(A)(3)(a).

38. There are two sets of ethics rules relating to *ex parte* communication. The one is found in the judges' code and the other is found in the lawyers' code. Canon 3B(7) of the Model Code of Judicial Conduct provides:

stantive<sup>39</sup> ex parte<sup>40</sup> communications about pending or impending cases protect this fundamental right, but in fact they sweep more broadly. The rules ban not merely private communications between a judge and a litigant or the litigant's lawyer. They also prohibit a wide range of undisclosed communications between a judge and any other person about the merits of a case. There are a few narrow, logical exceptions<sup>41</sup> to the general principle. The excep-

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A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . .

*Id.* at Canon 3(B)(7). Rule 3.5 of the Model Code of Prof'l Conduct states:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law . . . .

MODEL CODE OF PROF'L CONDUCT R. 3.5 (1983). These provisions need to be read in conjunction, for most judges are lawyers, and thus subject to both codes. In addition, "It is professional misconduct for a lawyer to . . . knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct."

MODEL RULES OF PROF'L CONDUCT R. 8.4(f) (1983).

39. A distinction is drawn by the judicial ethics code between communications relating to substantive matters or the merits of a case, on the one hand, and other types of communications. According to Canon 3B(7)(a) of the Model Code of Judicial Conduct:

Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

- (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
- (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7)(a) (1990). *See also In re Arrigan*, 678 A.2d 446 (R.I. 1996) (holding that a judge's communications with workers' compensation insurers were administrative in nature and did not constitute unethical ex parte communications). *But see In re Phalen*, 475 S.E.2d 327, 334 (W. Va. 1996) (holding that a family law master's ex parte discussion with litigants regarding selling home products to increase their incomes indirectly concerned pending proceedings in which the parties sought an order to reduce the husband's child support payments and thus violated the judicial conduct canon proscribing ex parte communications concerning a pending or impending proceeding).

40. The terms "ex parte" and "ex parte communication" have been variously defined. When used as an adjective, "ex parte" means "done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." BLACK'S LAW DICTIONARY 597 (7th ed. 1999). "Ex parte communication" means "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." *Id.*

41. Canon 3B(7)(d) and (e) of the Model Code of Judicial Conduct provide:

tions permit substantive communications between a judge and members of the judge's staff<sup>42</sup> or other judges,<sup>43</sup> and even communications with disinterested legal experts, provided the parties to the case are fully informed of what the experts say and allowed to respond.<sup>44</sup> Otherwise, judges are prohibited from discussing the merits of the suits before them with third parties. By insulating judges from contact with outside influences during the decision making process, the ethical standards tend to ensure that judges act independently when performing their judicial duties.

It is difficult to overstate the importance of the rules against ex parte communication. The rules help to ensure that a judge's decision is based on nothing other than law and evidence.<sup>45</sup> Without such provisions, it would be impossible for parties to effectively address the factual assertions and legal arguments placed before judges. Moreover, public confidence in the judicial process would be undermined because the citizenry would be deprived of the information that emerges from an open and transparent litigation process. Indeed, the public would not even know the identity of the persons who are making arguments that may prove critical in the resolution of pending matters.

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(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7)(d), (e) (1990).

42. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7)(c) (1990) ("A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities . . .").

43. *See id.* ("A judge may consult with . . . other judges").

44. Canon 3B(7)(b) of the Model Code of Judicial Conduct provides:

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

*Id.* at Canon 3B(7)(b).

45. Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645-46 (1995).

[J]udicial independence means simply that a life-tenured federal judge is free from all political and other outside pressures to decide cases in a wholly impartial manner. She must commit herself to following the Constitution, the statutes, common law principles, and the precedent that interprets each of them. Her decisionmaking is limited to properly admitted evidence, constrained by appropriate procedural rules, records, and legal principles. Prevailing political winds have no effect. The codes of conduct require a judge to adhere not only to the principle of actual impartiality and absence of outside influence, but also require a judge to be free from even the appearance of any improper influence.

Not surprisingly, allegations of improper ex parte communications are taken seriously, and violations can result in sanctions that carry with them the sting of disgrace. The careers of jurists on the high courts of New York<sup>46</sup> and Texas<sup>47</sup> have been rocked by charges of improper ex parte contact, and discipline has been imposed in a range of cases.<sup>48</sup> Although such controversies normally concern cases in the judge's own court, discipline may also be imposed on a judge with respect to ex parte communications involving cases pending before another judge.<sup>49</sup>

If third persons were allowed to communicate with sitting judges about pending matters through channels outside the normal litigation process, the administration of justice would be considerably less independent than it is today. Judges would be subject to many potentially disruptive influences, including those exerted by persons with neither a direct stake in the case nor an interest in the fair and impartial resolution of the dispute. Thus, the ethical rules against ex parte contact are fundamental pillars of American judicial independence.

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46. See *In re Fuchsberg*, 426 N.Y.S.2d 639, 646-47 (Ct. Jud. 1978) (holding that improper communications with law professors subjected a judge to censure and disapproval).

47. See Sam Kinch, Jr., *Power Struggle in Austin*, DALLAS MORNING NEWS, Apr. 11, 1986, at 19A (detailing the ethics controversy relating to ex parte communication by a San Antonio lawyer with a justice of the Texas Supreme Court), 1986 WL 4313772. The Commission on Judicial Conduct reprimanded the justice. R.G. Ratcliffe, *State Ethics Panel Scolds Pair of Justices for Poor Conduct*, HOUS. CHRON., June 10, 1987, at 1 (reporting the circumstances surrounding the reprimand), 1987 WL 5616096; Terrence Stutz, *2 Justices Cited for Misconduct*, DALLAS MORNING NEWS, June 10, 1987, at 1A (explaining the grounds for discipline), 1987 WL 4613603.

48. See, e.g., *Miss. Comm'n on Judicial Performance v. Dodds*, 680 So. 2d 180, 200 (Miss. 1996) (holding that removal was warranted for a judge who, among other things, engaged in ex parte communications); see also *In re Fine*, 13 P.3d 400 (Nev. 2000) (holding that expert who was first approached, hired, and paid for by a party in a child custody matter was not "court personnel" with whom judge could conduct even limited ex parte communications; the judge was removed from office).

49. See *Miss. Comm'n on Judicial Performance v. Brown*, 761 So. 2d 182, 186 (Miss. 2000) (holding that a public reprimand and fine are warranted where a judge commits judicial misconduct prejudicial to the administration of justice by making ex parte contacts with the judge assigned to his son's DUI case, including contacting an arresting officer and that officer's supervisor); *In re Santini*, 597 A.2d 1388 (N.J. 1991) (holding that conduct by municipal court judge in contacting three public officials on behalf of previous client warrants public reprimand); *In re Larsen*, 616 A.2d 529 (Pa. 1992) (holding that ex parte communication by an associate justice of the Supreme Court with a common pleas court judge relating to a matter pending before her warranted public reprimand notwithstanding lack of improper motive).

### B. Gifts

Gifts can create a sense of obligation on the part of the recipient and an expectation of reciprocal benefit on the part of the donor. In the judicial context, such obligations and expectations threaten to distort the adjudicatory process by creating a risk that decisions will be based on considerations other than merit.

The danger posed by gifts and similar benefits<sup>50</sup> is actually two-fold. First, there is the risk that a decision will be made by a judge who has been improperly influenced by a gift. Second, even if the judge has not been improperly influenced, there is a risk that the public will perceive a lack of impartiality. In the former situation, litigants and the public are deprived of the benefits of an independent judiciary. In the latter, the appearance of impropriety undermines public confidence in the judicial system. Either way, the public loses.<sup>51</sup>

As one would expect, the judicial ethics code contains an extensive, carefully crafted set of rules that attempt to distinguish gifts that pose unacceptable risks from those which are unobjectionable.<sup>52</sup> Thus, gifts that are ordinary<sup>53</sup> or appropriate in light of the

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50. The rule in the judicial code applies equally to a "gift, bequest, favor or loan." MODEL CODE OF JUDICIAL CONDUCT Canon 4(d)(5) (1990).

51. Cf. Abrahamson, *supra* note 29, at 24 (2000).

The public's willingness to support and fight for judicial independence depends on the public's understanding of, and trust and confidence in, the judicial system. A public that does not trust its judges to exercise even-handed judgment will look upon judicial independence as a problem to be eradicated.

*Id.*

52. According to Canon 4D(5) of the Model Code of Judicial Conduct:

A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

circumstances, relationships, or occasion<sup>54</sup> are overlooked, while gifts that come from persons likely to appear before the court, either personally or by interest, are forbidden.<sup>55</sup>

Prohibited gifts can take many forms including a flight on an airplane,<sup>56</sup> use of a condominium,<sup>57</sup> cash payments,<sup>58</sup> meals,<sup>59</sup> a dis-

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(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

MODEL CODE OF JUDICIAL CONDUCT Canon 4D(5) (1990).

53. *Id.* at Canon 4D(5)(c) (permitting "ordinary social hospitality"), (d) (permitting certain gifts from friends and relatives on special occasions), (f) (permitting loans on ordinary terms), and (g) (permitting scholarships and fellowships awarded on ordinary terms).

54. *Id.* at Canon 4D(5)(a) (permitting gifts incidental to public testimonials, materials for official use, and bar-related invitations), (b) (permitting certain gifts incidental to the career of a judge's spouse).

55. The judicial code's prohibition on gifts contains a broad exception that permits acceptance of a gift if "the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge," provided that reporting requirements are met. *Id.* at Canon 4D(5)(h).

56. Jeffrey M. Shaman, *Texas Supreme Court Justices Publicly Reprimanded, Admonished*, 9 J. CONFLICT RESOL. 1 (1987) (discussing discipline based on free flights); see also Tobias Weiss, *Judicial Independence: Another Viewpoint*, FED. LAW., Aug., at 39 (1999).

Even the highest court is not exempt [from criticism relating to gifts]. Where Supreme Court justices declined to review favorable decisions for West Publishing Company after taking trips for which West paid, a news magazine reported that in Washington "the Judiciary is joining cabinet members and lawyers on the suspect list." Although related to West-sponsored awards, they were regarded as junkets, about which Ralph Nader said he would complain "to the U.S. Judicial Conference about judges' roles in the West award."

*Id.*

57. *Adams v. Comm'n on Judicial Performance*, 897 P.2d 544, 562 (Cal. 1995).

58. *In re Cunningham*, 538 A.2d 473 (Pa. 1988) (holding that judges' acceptance of cash "gifts" from union warranted sanctions of suspension and removal or forfeiture of office).

59. *Cf. In re D'Auria*, 334 A.2d 332, 333 (N.J. 1975) (holding that a compensation judge acted improperly when he regularly had lunch as a guest of persons who were attorneys or representatives of insurance companies in pending workmen's compensation matters and that the appropriate sanction was suspension from the practice of law).

count on wallpaper,<sup>60</sup> or an unreasonably favorable deal on the purchase<sup>61</sup> or rental<sup>62</sup> of a car. Other provisions in the judicial ethics code dealing with excessive compensation of judges for extra-judicial tasks are akin to the rules governing gifts.<sup>63</sup> By barring jurists from being paid more than a non-jurist for performing an extra-judicial task, the compensation rules seek to prevent the conferral of benefits having monetary value that can threaten judicial independence by predisposing a judge to favor the interests of the payor.

Absent the rules on gifts and excessive extra-judicial compensation, it would be considerably more difficult for judges to be, in reality or appearance, independent from improper influences when deciding the disputes that come before them. A system in which gifts to judges are unregulated is one in which judges could not be expected to decide all suits fairly.

### C. Political Activities

The ethical rules governing political activity by judges and judicial candidates are exceptionally complex. Under the judicial ethics code, certain rules apply to all judges and candidates. For example, Canon 5 provides, with three important exceptions,<sup>64</sup> that

60. *In re Kral*, 1 Ill. Cts. Com. 20 (1973), cited in *Adams v. Comm'n on Judicial Performance*, 882 P.2d 358, 379 (Cal. 1994).

61. *Adams v. Comm'n on Judicial Performance*, 882 P.2d 358, 379-80 (Cal. 1994).

62. *In re Seraphim*, 294 N.W.2d 485, 498-99 (Wis. 1980).

63. Canon 4H(1) of the Model Code of Judicial Conduct provides in relevant part:

A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.

(a) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(b) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

MODEL CODE OF JUDICIAL CONDUCT Canon 4H(1) (1990).

64. Canon 5B(2)(b) provides:

[A] non-judge candidate for appointment to judicial office may, . . . unless otherwise prohibited by law:

(i) retain an office in a political organization,

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

*Id.* at Canon 5B(2)(b). Canon 5C(1) provides:



a judge or a candidate for election or appointment to judicial office shall not: (a) act as a leader or hold an office in a political organization; (b) publicly endorse or publicly oppose another candidate for public office; (c) make speeches on behalf of a political organization; (d) attend political gatherings; or (e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.<sup>65</sup>

These basic rules are supplemented by two other sets of rules, one applying only to candidates seeking appointment to judicial or governmental office<sup>66</sup> and the other applying only to judges and candidates subject to public election.<sup>67</sup>

In general, the ethics rules on political activity are intended to distance judges and candidates from the pressures of politics. However, it is necessary to accommodate the reality that many judges must run for election and that political parties often play a role in judicial elections and appointments. Such accommodations undoubtedly cause the ethics rules to fall short of wholly separating judicial decision making from politics. For example, the rules provide that the solicitation of campaign contributions for judicial races be handled by committees and that judges not personally so-

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A judge or a candidate subject to public election may, except as prohibited by law:

- (a) at any time
  - (i) purchase tickets for and attend political gatherings;
  - (ii) identify himself or herself as a member of a political party; and
  - (iii) contribute to a political organization;
- (b) when a candidate for election
  - (i) speak to gatherings on his or her own behalf;
  - (ii) appear in newspaper, television and other media advertisements supporting his or her candidacy;
  - (iii) distribute pamphlets and other promotional campaign literature supporting his or her candidacy; and
  - (iv) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.

*Id.* at Canon 5C(1). Canon 5C(5) provides:

Except as prohibited by law, a candidate for judicial office in a public election may permit the candidate's name:

- (a) to be listed on election materials along with the names of other candidates for elective public office, and
- (b) to appear in promotions of the ticket.

*Id.* at Canon 5C(5).

65. *Id.* at Canon 5A.

66. *Id.* at Canon 5B.

67. *Id.* at Canon 5C.

licit or accept contributions.<sup>68</sup> But to the extent that judges are allowed to know who has contributed to their campaigns, decisional judicial independence is threatened.<sup>69</sup>

Nevertheless, some provisions in the judicial ethics code go quite far to take politics out of judicial elections. The provisions governing statements made by candidates in judicial campaigns are one example. Ordinarily, the essence of a political campaign is to discuss the issues of the day, to promise action, and to criticize one's opponent. However, under vigorously enforced ethics provisions, a candidate for judicial office shall not

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or
- (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.<sup>70</sup>

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68. *Id.* at Canon 5C(2).

69. *Cf.* Rusty Robnett, *Judicial Independence—Deja Vu?*, 44 *FED. ADVOCATE* 4 (2001).

Judicial independence was . . . under attack in several states during the last election cycle. Literally millions of dollars were raised and spent by political action committees and other groups across the political spectrum in attempts to defeat or retain appellate judges. Examples include the judicial races in Ohio, Michigan, Illinois, Alabama, and Mississippi. In several instances, contributions were in the upper six figure or seven figure range. These contributions were often made by groups whose members were directly impacted by decisions issued by those courts.

*Id.* See also Eid, *supra* note 11, at 72 (2001), stating:

Another concern is the strong correlation between campaign contributions and the outcomes in specific cases. CBS's *60 Minutes* program first popularized this connection in its memorable report on the 1980s *Texaco v. Pennzoil* decision by the Texas Supreme Court. In that case, Texaco donated \$72,700 to several Texas Supreme Court justices. Not to be outdone, Pennzoil donated more than \$315,000 to the justices. Pennzoil received a \$10.53 billion award . . . .

*Id.* According to Dorsaneo, *supra* note 14, at 258 n.7 (2000):

[A] study conducted by Texans for Public Justice (TPJ) supports the position that sizable campaign contributions corrupt the appearance of judicial independence. According to this study, more than forty percent of the \$9.2 million raised by the seven winning judicial candidates for the Texas Supreme Court in 1994 and in 1996 came from parties with cases before the court, or from sources closely affiliated with those parties.

70. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d) (1990).

By removing judges from the political fray, these rules tend to facilitate judicial independence. Judges are not tied to issue-based constituencies, nor does the risk of inconsistency with prior campaign statements deny them the freedom to consider each case on its merits.

The pursuit of judicial independence through campaign speech restrictions may come at a heavy price since the rules deprive the voting public and appointing authorities of much information they would prefer to have.<sup>71</sup> It is interesting to consider the value choices that drive the campaign-statement ethics rules. In America, free speech is among the most highly prized liberties.<sup>72</sup> The ethics rules say that in the context of judicial campaigns, the furtherance of judicial independence often trumps free speech.<sup>73</sup> Some courts have refused to endorse that position,<sup>74</sup> but ethical limitations on the political conduct of judges have generally been upheld.

While the rules of judicial ethics certainly do not wholly insulate judges from the pernicious influence of politics, they undoubtedly contribute to the independence of the judiciary.

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71. See generally *In re Riley*, 691 P.2d 695, 708 (Ariz. 1984) (C.J. Holohan dissenting) (arguing that the restrictions announced by the majority limiting statements by lawyer candidates for judicial office were incompatible with the freedoms granted by the First Amendment). See also Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH L. REV. 811, 833 (1998) (suggesting that a broad interpretation of the ethics rule prohibiting discussion of justiciable issues may mean that "the public is relegated to vapid campaign rhetoric").

72. U.S. CONST. amend. I.

73. See generally *Riley*, 691 P.2d at 704 (stating that lawyers who are candidates for judicial office may not make statements that question the decisions of judges). See *Discipline of Hopewell*, 507 N.W.2d 911, 917 (S.D. 1993).

A lawyer may engage in political activity and speak as freely as any other citizen. But in a contest between lawyers for a judicial office, a lawyer under his oath and the duties imposed upon him by law has an added responsibility and should seek to maintain a higher standard of conduct than can be expected of one who is not a member of a privileged and a responsible profession (citation omitted) . . . The right of free speech does not 'give a lawyer the right to openly denigrate the court in the eyes of the public.'

*Id.*

74. See Richard A. Dove, *National Summit on Improving Judicial Selection: Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1448 (2001) ("[S]ome courts have found attempts to regulate judicial campaign conduct to be overbroad restrictions on a candidate's First Amendment rights to communicate his or her message to the electorate.").

#### D. Certain Problematic Relationships

Threaded throughout the judicial ethics code are a variety of provisions concerned with preventing harm to the administration of justice through problematic relationships between judges and other persons or entities. This concern is reflected generally in Canon 2B, which cautions that “[a] judge shall not allow family, social, political, or other relationships to influence the judge’s conduct or judgment.” However, other provisions are more specific. Some rules deal with relationships that should be avoided so a judge may perform judicial tasks, while others address unavoidable relationships that require a judge to stand aside. In the former category are provisions relating to judicial participation in governmental, civic, and charitable activities<sup>75</sup> and to the financial activities of judges. Canon 4C(3)(a) states:

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge, or will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Further, Canon 4D(1) says, “A judge shall not engage in financial and business dealings that involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.”

Framed in prophylactic terms, it is reasonable to suggest that these provisions are designed, at least in part, to ensure that if a judge decides a matter, the judge does so only where there is no foreseeable risk to the exercise of independent judgment.<sup>76</sup> If a business partner or an organization in which the judge participates

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75. A myriad of rules under Canon 4 seek to address the issues raised by a judge’s extra-judicial activities. The rules are driven by a variety of objectives. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 4A(3) (1990) (minimizing interference with the performance of judicial duties); *id.* at Canon 4A(2) (preserving the prestige of judicial office); *id.* at Canon 4C(3)(b)(iv) (avoiding the use of judicial office for the advancement of private interests). Furthermore, a judge “shall not personally participate in the solicitation of funds or other fund-raising activities” of a private organization. *Id.* at Canon 4C(3)(b)(i). Only some of the rules relating to extra-judicial activities are intended to preserve judicial independence in the sense that they seek to ensure that judges are not exposed to undue or inappropriate pressures that might intrude upon judicial decision making. *See id.* at Canons 4A and 4C.

76. In this respect, the provisions under discussion are somewhat different from another provision in the code dealing with impermissible relationships, Canon 2C.

is a litigant in the judge's court, the circumstances may give rise to an unacceptable appearance of impropriety.<sup>77</sup> If the judge's impartiality might reasonably be questioned, recusal may be required,<sup>78</sup> but if the facts are such that recusal is not necessary, there may nevertheless be a threat to the judge's exercise of independent judgment by reason of the pre-existing relationship. To the extent that they reach beyond the provisions governing disqualification, the quoted rules seek to eliminate that threat to judicial independence.

The rules on disqualification address, among other things, relationships that generally cannot be avoided, but which are so problematic that recusal is required. Thus, under Canon 3E(1):

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . (b) the judge [previously] served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . . ; [or] (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; [or] (iv) is to the judge's knowledge likely to be a material witness in the proceeding . . .<sup>79</sup>

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A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. The commentary to Canon 2C makes clear that the rule is concerned mainly with avoiding the appearance of impropriety rather than the threat that judicial decision making will be influenced by the judge's relationship to the organization. It states in relevant part:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired . . . [A] judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety . . . Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

MODEL CODE OF JUDICIAL CONDUCT Canon 2C (1990).

77. *See id.* at Canon 2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.").

78. *See id.* at Canon 3E (2000) (discussing disqualification).

79. *Id.* at Canon 3E(1).

Where these types of relationships exist, there is a chance that the judge will be tempted toward favoritism on behalf of the person in question. However, the risks extend beyond favoritism. There is also a threat that the persons related to the judge will endeavor to exploit the relationship by exerting pressure with respect to the decision of pending matters. That is, the relationship presents an occasion for the exercise of inappropriate pressure, which, if unaddressed, might corrupt the decision making process. To avoid this danger, the rules on disqualification require recusal. The rules can therefore be understood as intended, in part,<sup>80</sup> to prevent threats to decisional judicial independence that arise when persons closely connected to the judge are involved in litigation before the judge's court.

### III. REINFORCEMENT OF JUDICIAL NORMS THROUGH CODES APPLICABLE TO LAWYERS

The provisions in the judicial ethics code that foster independent decision making by judges are buttressed by principles of professional responsibility applicable to lawyers. The Model Rules of Professional Conduct, for example, provide that, "It is professional misconduct for a lawyer to . . . knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct . . . ."<sup>81</sup> Thus, threats to judicial independence that involve lawyers—such as ex parte communications or gifts made by counsel—are deterred from both ends. Not only is the judge prohibited from participating in such conduct, but lawyers, under penalty of discipline, are deterred from knowingly assisting a judge to violate standards of judicial ethics.

In addition, it is generally recognized that lawyers have a duty to protect judicial independence by defending judges from unjust criticism.<sup>82</sup> The now-superseded Code of Professional Responsibility stated that "[a]djudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against

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80. Under the rules of judicial ethics, there are a variety of situations in which a judge must step aside, rather than decide a case. Many of these involve threats to impartiality, such as personal prejudice, *id.* at Canon 3E(1)(a), or knowledge of disputed evidentiary facts, *id.* at Canon 3E(1)(a), but could not easily be said to entail a threat to judicial independence as a result of inappropriate outside pressures.

81. MODEL RULES OF PROF'L CONDUCT R. 8.4(i) (1983).

82. See generally James Podgers and John Gibeaut, *Speaking Out for Judges: ABA Acts to Reinforce Defense of Judicial Independence*, 84 A.B.A. J. 86, 86 (1998) (discussing ABA efforts to defend judges from political attacks).

unjust criticism.<sup>83</sup> While this language, unfortunately, was not carried forward into the Model Rules of Professional Conduct, the obligation is still widely recognized.<sup>84</sup> For example, in its recent report on judicial independence, the American Bar Association recommended that

State and local bar associations . . . develop effective mechanisms for evaluating and, when appropriate, promptly responding to misleading criticism of federal judges and judicial decisions in each federal judicial district.<sup>85</sup>

Such action by the bar diminishes the influence of those who would seek to intrude upon judicial decision-making by means of unwarranted attacks. The defense of judges from unfair comment tends to ensure that judges will not be swayed by inappropriate influences and will act independently based solely on the law and evidence.

#### IV. CONCLUSION: THE INDISPENSABLE CONTRIBUTION OF ETHICS TO AMERICAN JUDICIAL INDEPENDENCE

Structural considerations alone, such as those which govern the selection, compensation, and retention of judges, cannot ensure judicial independence.<sup>86</sup> Those matters are undoubtedly important in creating an environment in which judicial independence can flourish. But ultimately, judicial independence depends on the ethical norms that regulate recurring threats to the judicial decision-making process.

The principles of judicial ethics which prohibit *ex parte* communications and improper gifts; limit political activities of judges; require judges to avoid certain problematic relationships; and mandate recusal from cases involving closely connected persons make a major contribution toward the independence of the American judiciary. It is easy to take these norms for granted, as they are now well-integrated into our expectations of judicial conduct. One can overlook their role in ensuring that disputes are decided by

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83. MODEL CODE OF PROF'L RESPONSIBILITY EC 8-6 (1980).

84. See also Cooper, *supra* note 23, at 64 (2001) (discussing the responsibility of the organized bar to respond to improper criticism of judges).

85. ABA COMM. ON SEPARATION OF POWERS AND JUD. INDEPENDENCE, AN INDEPENDENT JUDICIARY (1997), <http://www.abanet.org/govaffairs/judiciary/r6b.html>.

86. Of course, reasonable people may differ about how much judicial independence is desirable. No one would want courts that were completely unaccountable, just as no one would want courts that were completely subservient. Judicial independence and judicial accountability must co-exist, but a discussion of judicial accountability is beyond the scope of this article.

jurists who are not subject to inappropriate or undue pressures. Without these norms, however, an independent judiciary could not exist.

The federal courts would neither be, nor appear to be, independent, if unknown third persons were free to communicate with judges about pending disputes; if litigants could make substantial gifts to judges; if judges played an active role in national political campaigns; or if judges had close ties to the persons whose cases they decide. Conversely, even when state judges are not protected by life-time appointments, guarantees of non-reducible compensation, or removal only through an arduous impeachment process, they can still be perceived as exhibiting an important degree of independence if insulated by ethical standards from improper communications, gifts, activities, and relationships.

The independence of the American judiciary depends heavily on the ethical standards that prevent or mitigate harm to the exercise of judicial judgment by inappropriate pressures flowing from activities or relationships involving persons outside the court. Absent those safeguards, the status, operations, and effectiveness of the judiciary would be vastly different from what it is today.